Judicial Experience Under the Federal Tort Claims Act[1]

For convenience in discussing the cases, no attempt has been made to follow the sections of the act in the order in which they appear.[2]

COVERAGE

The act makes the United States Government liable for the torts of its employees[3] except in twelve enumerated classes of claims,[4] on the doctrine of respondeat superior,[5] and the district courts have jurisdiction of all claims without regard to minimum or maximum jurisdictional amount.[6] Little difficulty is evidenced in the reported cases in disposing of claims not sounding in tort, but it was necessary in one case to hold that a claim for unpaid wages and bonus under an employment contract with the army transport service was not within the scope of the act.[7] The federal government has never waived its sovereign immunity with respect to liability for damages arising from the invasion of rights pro-

[1] 28 U.S.C.A. §§1291, 1346, 1402, 1504, 2110, 2401, 2411, 2412, 2671-2680; 60 STAT. 842 *et seq.* (1946), 61 STAT. 722 *et seq.* (1947), 28 U.S.C. §921 *et seq.* (1946).

[2] For a discussion of administrative procedure under the act see Walker, *Administrative Settlement of Claims under the Federal Tort Claims Act,* 9 OHIO ST. L.J. 445 (1948).

[3] "Subject to the provisions of chapter 173 (the chapter numbers were changed in the Senate amendments to H.R. 3214 and this number now refers to chapter 171 entitled 'Tort Claims Procedure,' 28 U.S.C.A. §2671 *et seq.* of the new judicial code, approved June 25, 1948) of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable. . . ." 28 U.S.C.A. §1346 (b) (1948), 28 U.S.C. §931 (1946); *accord,* Long v. United States, 78 F. Supp. 35 (S.D. Cal. 1948) (government liable only on basis of respondeat superior); Lundy v. United States, 78 F. Supp. 354 (N.D. Fla. 1948) (Towing an airplane on a highway does not constitute a wrongful act so as to permit recovery regardless of negligence).

[4] 28 U.S.C.A. §2680 (1948), 60 STAT. 845, §421 (1946), 28 U.S.C. §943 (1946).

[5] Long v. United States, *supra* note 3.

[6] Bates v. United States, 76 F. Supp. 57 (D. Neb. 1948).

[7] Jentry v. United States, 73 F. Supp. 899 (S.D. Cal. 1947). See 28 U.S.C.A. §2680 (d) (1948), which exempts admiralty claims.

tected by the Fourth and Fifth Amendments, except for claims for property taken without just compensation for which an action will lie in the Court of Claims,[8] and the act expressly denies such consent.[9]

Employee acting within the scope of his employment[10] includes members of the armed forces acting in line of duty.[11] However, the agency problem still exists with members of the armed forces. It has been held that a naval recruiting officer returning home in his own automobile after a recruiting broadcast was not performing any special or general duty and was not, therefore, acting in the line of duty.[12] On the other hand, sailors traveling under government orders who had left their train to obtain refreshments were held to be acting in line of duty and the government held liable for injuries caused when one of the sailors bumped into an elderly woman while running to catch the departing train.[13] The loaned servant doctrine has presented some difficulty. Where military personnel were loaned to state schools to teach military science, liability depended upon the benefits conferred as between state and nation, and extent of control of the military personnel over the equipment; therefore, the government's motion for summary judgment was overruled.[14] But if equipment alone is loaned and is operated by agents not subject to the control of the government, no liability ensues even though the government contributes the money out of which the employee's salary is paid.[15] It would seem that the court's disregard of the benefit theory in the latter case is explained by state law.[16]

The act exempts injuries arising from combatant activities of military forces during time of war,[17] but army training even during time of war is not within this exemption.[18] In an action charging

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[8] United States v. Causby, 66 Sup. Ct. 1062 (1946) (where the "taking" was by federal planes flying so low over the property that it could no longer be used for raising of chickens).

[9] Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947); Ekberg v. United States, 76 F. Supp. 99 (Court of Claims 1948); 28 U.S.C.A. §2680 (h) (1948), 60 STAT. 845 §421 (h) (1946), 28 U.S.C. §943 (h) (1946).

[10] 28 U.S.C.A. §1346 (b) (1948), 60 STAT. 843 §410 (1946), *as amended,* 61 STAT. 722 §410 (1947), 28 U.S.C. §931 (1946).

[11] 28 U.S.C.A. §2671 (1948), 60 STAT. 842 §402 (1946), 28 U.S.C. §941 (1946).

[12] Rutherford v. United States, 73 F. Supp. 867 (E.D. Tenn. 1947).

[13] Campbell v. United States, 75 F. Supp. 181 (E.D. La. 1948).

[14] Cobb v. United States, 74 F. Supp. 713 (W.D. La. 1947).

[15] Fries v. United States, 76 F. Supp. 396 (W.D. Ky. 1948).

[16] Statt v. Louisville & N. R.R., 270 Ky. 787, 110 C.W. 2d 1086 (1937).

[17] 28 U.S.C.A. §2680 (j) (1948), 60 STAT. 845 §421 (j) (1946), 28 U.S.C. §943 (j) (1946).

[18] Skeels v. United States, 72 F. Supp. 372 (W.D. La. 1947).

malpractice by a doctor assigned to the Veterans Administration, the government's contention that the Veterans Administration should receive the immunity accorded charitable institutions under state law was refused as not applicable to the United States.[19] Payment by the government of medical bills under 31 U.S.C.A. §223 (b)[20] is not a bar to an action since there is no duplication of payments.[21] Nor is award of compensation under the Federal Employees' Compensation Act,[22] prior to the effective date of the Tort Claims Act, a bar or waiver since alternative remedies were not in existence and the compensation paid will be set off from any award recovered.[23]

The status of service-incurred injuries under the act is not too clear at the present time. Only one reported case has given a judgment for the claimant;[24] however, another recent decision overruled the government's motion for summary judgment, but reserved the point for further consideration at the time of trial.[25] The court held that it is bound by ordinary rules of interpretation,[26] and that Congress left no uncertainty in defining and explaining the relationship between members of the armed forces and the government, and included such claims unless they arise out of combatant activities during time of war.[27] Similar reasoning was followed to reach the same result in the *Jefferson* case[28] when heard on the government's motion for judgment on the pleadings. Judge Chesnut in the opinion bases his argument, in part, on the words then appearing in the act: ". . . and render judgment on *any* claim against the United States." (Emphasis supplied).[29] In the present provision of the new judicial code, the modifying word "any" is omitted.[30] There is no reason to believe that this trivial modification indicates any change of legislative intent; nevertheless, it remains to be seen what attitude our courts take in the future. However, before the present change,

[19] Perucki v. United States, 76 F. Supp. 34 (M.D. Pa. 1948).

[20] 57 STAT. 372 (1945), *as amended,* 59 STAT. 225 (1945), 60 STAT. 332 (1946), 61 STAT. 501 (1947), 31 U.S.C. §223 (b) (1946) (Settlement of claims incident to activities of army or Department of the Army).

[21] Wade v. United States, 75 F. Supp. 729 (D. Mass. 1948).

[22] 39 STAT. 742 (1916), 5 U.S.C. §751 *et seq.* (1946). See Wagner v. City of Duluth, 211 Minn. 252, 300 N.W. 820 (1941); Oklahoma City v. Caple, 187 Okla. 600, 105 P. 2d 209 (1940).

[23] White v. United States, 77 F. Supp. 316 (D. N.J. 1948).

[24] Stoddard v. United States, 75 F. Supp. 839 (D. Mass. 1948).

[25] Alansky v. Northwest Airlines, Inc., 77 F. Supp. 556 (D. Mont. 1948).

[26] Takao Ozawa v. United States, 260 U.S. 178 (1922).

[27] Note 25 *supra.*

[28] Jefferson v. United States, 74 F. Supp. 209 (D. Md. 1947).

[29] 60 STAT. 843 §410 (a) (1946), *as amended,* 61 STAT. 722 §410 (a) (1947), 28 U.S.C. §931 (a) (1946).

[30] 28 U.S.C.A. §1346 (b) (1948).

if indeed it is, was made, Judge Chesnut had reversed his previous holding on the trial of the case on its merits.[31] The reasons assigned for reaching a different conclusion of law were: (a) the purpose of the act was to relieve Congress of the onerous task of private bills to compensate for common law tort claims and not service-connected injuries which are already provided for;[32] and (b) there is a distinctive government-soldier relation recognized by the Supreme Court.[33]

STATUTE OF LIMITATIONS

The act incorporates its own statute of limitations which bars claims against the United States unless an action is begun within one year after such claim accrues.[34] The act was made retroactive to permit suits on causes of actions accruing on or after January 1, 1945,[35] and if the cause of action accrued prior to January 1, 1945, relief may not be had under the act.[36] Virtually all of the difficulty encountered in determining whether the state statute of limitations should apply by virtue of the provision in the act making the United States liable ". . . in accordance with the law of the place where the act or omission occurred",[37] has now disappeared. The 1946 act was made retroactive to include actions accruing on or after January 1, 1945, and actions could be brought ". . . within one year after such claim accrued *or within one year after August 2, 1946, whichever is later* . . ."[38] (Emphasis supplied). Tort claims are barred in many states in one year, and the government contended that since an individual could not be sued after one year, and since the government is liable only to the same extent as a private individual under like circumstances,[39] then the claim against

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[31] Jefferson v. United States, 77 F. Supp. 706 (D. Md. 1948).

[32] SEN. REP. No. 1400, 79th Cong., 2d Sess. 29 (1946); H. R. REP. No. 1675, 79th Cong., 2d Sess. (1946).

[33] United States v. Standard Oil Co. of California, 332 U.S. 301 (1947).

[34] 28 U.S.C.A. §2401 (b) (1948), 60 STAT. 845 §420 (1946), 28 U.S.C. §942 (1946). But see, Bay State Crabmeat Co. v. United States, 78 F. Supp. 131 (D. Mass. 1948). Where a libel in admiralty was filed against the United States within one year after the damage was inflicted, libelant may amend the complaint so as to strike all references to libel and to admiralty and present a claim for damages as of the date the original pleading was filed, notwithstanding that more than one year had elapsed since the cause of action accrued.

[35] 60 STAT. 843 §410 (a) (1946), *as amended,* 61 STAT. 722 (1947), 28 U.S.C. §921 (a) (1946).

[36] Edwards v. United States, 163 F. 2d 268 (C.C.A. 9th 1947).

[37] 28 U. S. C. A. §1346 (b) (1948), 60 STAT. 843 §410 (a) (1946), *as amended,* 61 STAT. 722 §410 (a) (1947), 28 U.S.C. §931 (a) (1946).

[38] 60 STAT. 845 §420 (1946), 28 U.S.C. §942 (1946).

[39] 28 U.S.C.A. §2674 (1948), 60 STAT. 843 §410 (a) (1946), *as amended,* 61 STAT. 722 §410 (a) (1947), 28 U.S.C. §931 (1946).

the United States must also be barred after one year from the date claim arose according to state law, notwithstanding the alternative provision of the act permitting an action one year after August 2, 1946.[40] One district court sustained the government's contention and dismissed the action;[41] on appeal the decision was reversed.[42] Judge Parker speaking for the court said, "We think, however, that the purpose and effect of the language of the statute is that we shall look to the law of the state for the purpose of defining the actionable wrong for which liability shall exist on the part of the United States, but to the act itself for the limitations of time within which action shall be instituted to enforce the liability."[43] Judge Parker further pointed out that the subsequent history of the act also indicates that the limitation of the act itself must govern. For states whose wrongful death statutes permit only punitive damages, an amending statute was passed[44] granting compensatory damages and extending the period for suit in such cases for an additional year, or until August 2, 1948.[45] Similar results were reached in the other reported cases in which the issue was raised.[46]

If any doubt remained as to the controlling effect of the limitations provided by the act itself, the mere passage of time has removed that doubt. In the new judicial code the alternative provision was dropped because already executed.[47]

In an action alleging a continuing nuisance or continuing trespass where the nuisance or trespass began before the effective date of the act, a complaint for damages for the continuing trespass may be maintained for damages after the effective date of the act.[48]

A different problem is presented in determining when a cause of action arises between an insured and his insurer. An army bomber struck the Empire State Building. At the time individuals could not bring an action against the government. Plaintiffs were paid compensation under the New York compensation law which provided that if the individual did not bring an action within six

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[40] See note 38 *supra.*

[41] Maryland v. United States, 70 F. Supp. 982 (D. Md. 1947).

[42] Maryland v. United States, 165 F. 2d 869 (C.C.A. 4th 1947).

[43] Maryland v. United States, *id.*, at 871.

[44] 61 STAT. 722 §410 (a) (1947), 28 U.S.C. §931 (a) (1946).

[45] Pub. L. No. 324, 80th Cong. 1st Sess. (Aug. 1, 1947).

[46] Sweet v. United States, 71 F. Supp. 863 (S.D. Cal. 1947); Wiltse v. United States, 74 F. Supp. 786 (W.D. La. 1947); Kahn v. United States, 75 F. Supp. 689 (N.D. Cal. 1948) (State statute of limitations not part of the substantive common law right to recover for personal injuries caused by negligence. Act does not purport to adjust local remedial law in conflict with provisions of the act).

[47] 28 U.S.C.A. §2401 (b) (1948). See reviser's notes TITLE 28, U. S. CODE CONGRESSIONAL SERVICE §2401 (1948).

[48] Lemaire v. United States, 76 F. Supp. 498 (D. Mass. 1948).

months his failure operated as an assignment of the cause of action to the insurance carrier.[49] The New York Workmen's Compensation Law was amended to permit an action against a third party to be commenced not later than nine months after the enactment of a law creating, establishing, or affording a new or additional remedy.[50] It was held that the cause of action did not accrue until the effective date of the Tort Claims Act and did not pass to the Commissioners of the state fund until nine months after the date of the federal act. Immunity of the United States implies that no substantive right of action existed against it and not that there was merely a procedural impediment against its enforcement.[51]

PROCEDURE

Procedure under the Tort Claims Act is governed by the Federal Rules of Civil Procedure.[52] Now that the Tort Claims Act has been made a part of the judicial code a repetition of such provision is unnecessary and has been eliminated.[53]

Ordinarily a statute of limitation must be pleaded, but because the right to sue the government did not exist at common law and is created by a statute which makes the bringing of an action within a specified time a condition precedent to the existence of the cause of action, it may be raised by motion in an action under the Tort Claims Act.[54]

Payment of clerk's fees is a prerequisite of filing a petition under the act, and unless an action is seasonably commenced, the court lacks jurisdiction.[55] Acceptance of an award of federal compensation before the effective date of the Tort Claims Act does not constitute an election or waiver since alternative remedies were not then in existence.[56] Payment of medical bills by the government is not a bar to a subsequent action under this act because there is

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[49] N.Y. WORKMEN'S COMPENSATION LAW §29 (2) (1946).

[50] N.Y. WORKMEN'S COMPENSATION LAW §29 (1) (Supp. 1948).

[51] Commissioners of Ins. Fund v. United States, 72 F. Supp. 549 (S.D. N.Y. 1947). *Cf.* Reed Co., Inc., v. International Container Corp., 43 F. Supp. 644 (S.D. N.Y. 1942) (New York law action accrued when plaintiff first became entitled to maintain the action); Oldford v. Moran Towing Corp., 186 Misc. 46, 60 N.Y.S. 2d 924 (Sup. 1945), *aff'd*, 270 App. Div. 822, 60 N.Y.S. 2d 52 (2d Dept. 1948).

[52] 60 STAT. 844 §411 (1946), 28 U.S.C. §932 (1946).

[53] SEN. REP. No. 1559, amendment No. 61 (1948). TITLE 28, U. S. CODE CONGRESSIONAL SERVICE 1841 n. 41 (1948).

[54] Sikes v. United States, 8 F.R.D. 34 (E.D. Pa. 1948).

[55] Turkett v. United States, 76 F. Supp. 769 (N.D. N.Y. 1948). Smith v. Johnson, 109 F. 2d 152 (C.C.A. 9th 1940); Rules 3 and 4, Federal Rules of Civil Procedure, 28 U.S.C. following §723 (c) (1946).

[56] White v. United States, 77 F. Supp. 316 (D. N.J. 1948).

no duplication of payments,[57] and payments made will be deducted from any award recovered under this act.[58] A complaint that alleges that the action arises under a law regulating interstate and foreign commerce is too general to sustain jurisdiction.[59] Even though jurisdiction is not challenged by the individual defendant, the court is under a duty to enforce its jurisdictional requirements where the defect is on the record.[60]

Joinder of parties defendant has presented a difficult problem and the courts are not at all in agreement on the proper solution. In the majority of cases raising the question, the joinder of an individual with the United States as a joint tortfeasor has been permitted.[61] The solution to the problem depends equally on who attempts the joinder and on the existence of jurisdictional requirements, as well as on a determination of the proper interpretation to be given the act itself.

A sovereign is not suable except by its own consent; therefore, an individual suing the United States has no constitutional right to demand a jury trial, but must accept the method of trial granted by Congress. When an individual is joined as a party defendant, he is entitled, under the Seventh Amendment to the Constitution, to a jury trial. In *Englehardt v. United States*,[62] the plaintiff sued the United States and an individual as joint tortfeasors, and the individual moved to dismiss the action. The government opposed the motion in order that its right to contribution, as provided by state law,[63] might be asserted. Judge Chesnut held that joinder was not objectionable since only the individual could demand a jury trial, and the flexibility afforded by the Federal Rules permits separate trials where, in the discretion of the court, it is necessary to avoid prejudice.[64] As a practical matter, Judge Chesnut points out that in the great majority of such tort actions, individual defendants do not want a jury trial, but prefer trial by the court. While recognizing that the leading case decided under the Tucker Act[65] denied joinder of an individual with the United States under that act,[66]

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[57] Wade v. United States, 75 F. Supp. 729 (D. Mass. 1948).

[58] White v. United States, *supra* note 56.

[59] Bullock v. United States, 72 F. Supp. 445 (D. N.J. 1947).

[60] *Ibid.*

[61] Englehardt v. United States, 69 F. Supp. 451 (D. Md. 1947); Bullock v. United States, 72 F. Supp. 445 (D. N.J. 1947); Forrester v. United States, 75 F. Supp. 272 (E.D. Wis. 1947). Rule 20 (a), Federal Rules of Civil Procedure, 28 U.S.C. following §723 (c) (1946).

[62] See note 61 *supra*.

[63] MD. ANN. CODE GEN. LAWS art. 50, §§21-30 (Supp. 1943).

[64] Rules 38, 39 and 42 (b), Federal Rules of Civil Procedure, 28 U.S.C. following §723 (c) (1946).

[65] 28 U.S.C. §41 (20) (1946).

[66] United States v. Sherwood, 312 U.S. 584 (1941).

Judge Chesnut clearly indicates that the jurisdiction of the district courts granted by the Tort Claims Act is far different from the jurisdiction granted under the Tucker Act, and the interpretation of the Tucker Act is not applicable to the Tort Claims Act.[67] On the other hand, Judge Chesnut found that the Suits in Admiralty Act[68] is, in its grant of jurisdiction, almost identical with the Tort Claims Act, and such joinder under the Suits in Admiralty Act is common practice.[69]

For a plaintiff to join an individual as a joint tortfeasor, there must be diversity of citizenship between the plaintiff and the individual defendant,[70] and presumably he must meet the $3,000 minimum requirement, although that point has not yet been decided. The government cannot move to dismiss the action for want of diversity to defeat liability by oblique attack, but may move to dismiss the individual on the theory that it acts on behalf of its employee.[71] Misjoinder is no longer a ground for dismissal under the

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[67] ". . . as the jurisdiction of the district courts under the Tucker Act is only *concurrent* with the Court of Claims, the district courts under the Tucker Act likewise can have no jurisdiction in a suit against the United States jointly with other defendants." Englehardt v. United States, 69 F. Supp. 451, 453 (D. Md. 1947). "Furthermore while it is true, as pointed out by the Supreme Court in the Sherwood case, that the Federal Rules of Civil Procedure enacted long after the passage of the Tucker Act, could not extend the jurisdiction of the district courts under the act . . . the Federal Tort Claims Act does expressly provide that the procedure under the Act shall be in accordance with the Federal Rules of Civil Procedure, one important object of which was to expedite the final determination of litigation by inclusion in one suit of parties directly interested herein despite technical objections to such joinders previously existing in many situations." Englehardt v. United States, *supra* at 454.

[68] 41 STAT. 525 (1920), 46 U.S.C. §742 (1946).

[69] "Although I have failed to find any decided cases in which it has been specifically held after consideration that other defendants than the United States may be sued under the Suits in Admiralty Act there have been numerous cases in which such situations have occurred without contest. It has been almost common practice in recent years in this court to join in a suit against the United States under the Suits in Admiralty Act, the maritime company or agency operating a merchant vessel under contract with the United States." Englehardt v. United States, 69 F. Supp. 451, 453-454 (D. Md. 1947). The Cotati, 2 F. 2d 394 (S.D. N.Y. 1923); The Peerless, 2 F. 2d 395 (S.D. N.Y. 1923); W. P. Tanner-Gross and Co. v. Elwell and Co., 2 F. 2d 396 (S.D. N.Y. 1924); Hidalgo Steel Co. v. Moore and McCormack Co., 298 Fed. 331 (S.D. N.Y. 1923); Brady v. Roosevelt S.S. Co., 317 U.S. 575 (1943); Hust v. Moore & McCormack Lines, 328 U.S. 707 (1946); The Everett Fowler, 151 F. 2d 662 (C.C.A. 2d 1945) .

[70] Englehardt v. United States, *supra* note 69; Dickens v. Johnson, 71 F. Supp. 753 (E.D. N.Y. 1947).

[71] Dickens v. Johnson, *supra* note 70.

Federal Rules,[72] and the court by its own motion may order any party dropped.[73]

The problem of joinder of parties defendant—by the plaintiff—may not be of more than passing interest since any judgment against the United States will be paid. The United States, on the other hand, has very substantial interests in bringing the individual tortfeasor into the action.[74] Under the Federal Rules the defendant may implead a third party who is or may be liable to him for all or part of the plaintiff's claim against him.[75] Since in a suit by the United States the amount in controversy is immaterial[76] and diversity of citizenship is not required,[77] the United States could bring in any individual without regard for jurisdictional requirements notwithstanding that the plaintiff could not in the first instance because of some jurisdictional defect. Moreover, if the original plaintiff could not, in the first instance, have joined the third party, he may not amend his complaint to assert any claim against the impleaded third party.[78] It would seem that in justice to the original plaintiff, who cannot assert a claim against the impleaded third party where diversity is lacking, that the impleaded third party

[72] Rule 21, 28 U.S.C. following §723 (c) (1946).

[73] Uarte v. United States, 7 F.R.D. 705 (S.D. Cal. 1948).

[74] "Thereupon after denial of the motion to dismiss the individual defendant (Englehardt v. United States, 69 F. Supp. 451), the individual defendant filed an answer to the complaint and prayed a jury trial. The case then proceeded to trial with a jury as between the plaintiff and the individual defendant, J. D. Quillen, and the court as between the plaintiff and the United States of America. The jurisdiction of the court in this case as against the United States was the Federal Tort Claims Act, but as between the plaintiff and the individual defendant, jurisdiction of the court was by reason of diversity of citizenship. I might add, in connection with the Englehardt case, that the jury found in favor of the plaintiff as against the individual defendant J. D. Quillen in the sum of $3,000.00, and the court found for the plaintiff against the United States for a like sum, each defendant paying $1,500.00 of the judgment to the plaintiff." Letter from Mr. James B. Murphy, Assistant United States Attorney for the District of Md. July 29, 1948.

[75] Rule 14 (a), 28 U.S.C. following §723 (c) (1946).

[76] 36 STAT. 1091 (1911), 48 STAT. 775 (1934), 50 STAT. 738 (1937), 54 STAT. 143 (1940), 28 U.S.C. §41 (1) (1946); United States v. Conti, 27 F. Supp. 756 (S.D. N.Y. 1939); Reconstruction Finance Corp. v. Krauss, 12 F. Supp. 44 (D. N.J. 1935).

[77] 1 CYCLOPEDIA OF FEDERAL PROCEDURE §137 (2d ed. 1943).

[78] Hoskie v. Prudential Ins. Co. of America v. Larrac Real Estate Corp., 39 F. Supp. 305 (E.D. N.Y. 1941); Thompson v. Cranston, 2 F.R.D. 270 (W.D. N. Y. 1942), *aff'd*, 132 F. 2d 631 (C.C.A. 2d 1942), *cert. denied*, 319 U.S. 741 (1943); Saunders v. Baltimore & O. R.R., 9 Fed. Rules Serv. 14 a. 62, case 2 (S.D. W. Va. 1945); Friend v. Middle Transportation Co., 153 F 2d 778 (C.C.A. 2d 1946), *cert. denied*, 328 U.S. 865 (1946); Comment, 46 MICH. L. REV. 1069, 1074 (1948).

should also be precluded from asserting any claim against the original plaintiff.[79]

Contribution is now permitted by court decision or statute in a considerable number of states.[80] Where state law permits contribution between joint tortfeasors the original defendant has been allowed to implead third parties as joint tortfeasors.[81] But where state law does not permit contribution between joint tortfeasors, the defendant may not implead a joint tortfeasor.[82]

No reported case has involved an impleaded third party under Rule 14, but in a case in the District Court for the District of Maryland, Civ. No. 3536, December 17, 1947, the United States was sued under the Tort Claims Act and the government, under Rule 14, impleaded two third party defendants. The third party defendants prayed a jury trial. The government dismissed its action against the individuals and there was no jury upon the trial of the case.[83]

Denying joinder, the most recent case in which the issue was litigated presents virtually all of the arguments thus far directed to the proposition.[84] These arguments briefly stated are: First, a judgment against the United States is a bar to a subsequent action against the employee[85] and if Congress had intended that the employee, or any other joint tortfeasor, be a party, this provision would be meaningless. Second, the act denies a jury trial[86] to which an individual is entitled as a matter of right. Third, the legislative intent expressed in the committee report of an identical provision of

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[79] Comment, 46 MICH. L. REV. 1069, 1076 (1948).

[80] La., Minn., Ore., and Pa. permit contribution between joint tortfeasors without the aid of statutes. Twelve other states and the Territory of Puerto Rico by statute: Ga., Kan., Ky., Md., Mich., Mo., N.M., N.Y., N.C., Texas, Va., W.Va. For a complete list of code sections see, Comment, 42 ILL. L. REV. 344, 356 n. 56 (1947).

[81] Crum v. Applachian Elec. Power Co. v. Winisle Coal Co., 29 F. Supp. 90 (S.D. W.Va. 1939); Gray v. Hartford Accident and Indemnity Co., 31 F. Supp. 299 (W.D. La. 1940), *aff'd*, 32 F Supp. 335 (W.D. La. 1940); Kravas v. Great Atlantic and Pacific Tea Co., 28 F. Supp. 66 (W.D. Pa. 1939).

[82] Brown v. Cranston, 132 F. 2d 631 (W.D. N.Y. 1942), *cert. denied sub. nom.*, Cranston v. Thompson, 319 U.S. 741 (1943). *Contra*: Gatink v. Township of Holland, 28 F. Supp. 67 (D. N.J. 1939).

[83] Letter from Mr. James B. Murphy, Assistant States Attorney, for the District of Maryland, dated July 29, 1948.

[84] Uarte v. United States, 7 F.R.D. 705 (S.D. Cal. 1948).

[85] U.S. C.A. §2676 (1948), 60 STAT. 843, §410 (b) (1946), *as amended*, 61 STAT. 722 §410 (b) (1947), 28 U.S.C. §931 (b) (1946).

[86] 28 U.S.C.A. §2402 (1948), 60 STAT. 843 §410 (a) (1946), *as amended*, 61 STAT. 722 §410 (a) (1947), 28 U.S.C. §931 (a) (1946).

a *prior* bill expressly negatives such joinder.[87] Fourth, joinder has been denied by the courts in actions under other acts permitting suits against the United States.[88]

Joinder of parties plaintiff depends upon the congressional intent plus the fact that each plaintiff joined be a real party in interest. An insurer which has paid its liability to its insured has been held a real party in interest.[89]

In an action for wrongful death where there was no eye witness and the plaintiff failed to produce evidence of negligence or facts from which negligence and causation by negligence might be inferred, the complaint was considered insufficient as a matter of law and was dismissed.[90]

Where an action was begun in a state court with the Reconstruction Finance Corporation as defendant, removal to a federal court, on the basis of the jurisdiction granted by the Tort Claims Act required that the amount in controversy exceed $3,000.00.[91]

CAUSES OF ACTION ARISING OUTSIDE THE UNITED STATES

Claims arising in a foreign country are exempted from the cov-

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[87] House Judiciary Committee Report on H.R. 181, 79th Cong., 1st Sess. 1945. "The bill, therefore, does not permit any person to be joined as a defendant with the United States and does not lift the immunity of the United States from tort actions except as jurisdiction is specifically conferred upon the district courts by this bill."

[88] a) actions under the Tucker Act, 36 STAT. 1093 (1911), 42 STAT. 311 (1921), 43 STAT. 348 (1924), 43 STAT. 972 (1925), 44 STAT. 121 (1926), 28 U.S.C. §41 (20) (1946).

b) actions under the Suits in Admiralty Act, 41 STAT. 525 (1920), 46 U.S.C. §742 (1946). Defense Supplies Corp. v. United States Lines, 148 F. 2d 311 (C.C.A. 2d 1945) (But note that this case turned on the fact that the United States was the real party in interest and was suing the United States. The plaintiff and defendant cannot be the same person, for in that event there is no real case or controversy).

[89] Hill v. United States, 74 F. Supp. 129 (N.D. Tex. 1947). *Contra*: Gray v. United States, 77 F. Supp. 869 (D. Mass. 1948). This problem is discussed further in this article under the heading "Derivative Claims", *infra* p. 484.

[90] Johnson v. United States, 75 F. Supp. 134 (E.D. N.Y. 1947), *aff'd.* 168 F. 2d 886 (C.C.A. 2d 1948). See also, Colerick v. United States, 77 F. Supp. 953 (N.D. Fla. 1948) (Last clear chance doctrine not applied where the government employee disregarded a traffic light, because plaintiff was entitled to assume that the government's agent would obey the traffic light); Lundy v. United States, 78 F. Supp. 354 (N.D. Fla. 1948) (Contributary negligence which is the proximate cause of the accident bars recovery).

[91] Crowder v. Reconstruction Finance Corp., Civ. No. 4543, W.D. Mo., Feb. 18, 1947. *Cf.* Wickman v. Inland Waterways Corp., 78 F. Supp. 284 (D. Minn. 1948), where the court held that a Government corporation can no longer be sued in its own name for tort. The Tort Claims Act provides for the exclusive remedy and the United States must be sued in its own name.

erage of the act.[92] Three cases, however, have had to interpret "foreign country." In the first of these cases,[93] plaintiff contended that Newfoundland was not a foreign country but a possession because the area where the claim arose was held by the United States under a ninety-nine year lease.[94] The court held that Newfoundland is a foreign country, and Congress specifically limited the meaning of "possessions" to those having district courts.[95] The second involved an accident occurring on Saipan, and the court held that possession and control by reason of military conquest and trusteeship by designation of the United Nations were insufficient to take it out of the exemption.[96] The third involved an injury to a member of the army of occupation in Belgium, and the court held that "foreign country" means all lands other than those for which Congress is the supreme legislative body, and the degree of control exercised by the executive branch of the government is immaterial.[97]

Liability Governed by State Law

The act provides that the United States shall be liable "in accordance with the law of the place where the act or omission occurred,"[98] except that the United States shall not be liable for punitive damages; but where state law provides only for punitive damages, the United State shall be liable for actual or compensatory damages.[99] The United States shall be liable for interest only after judgment.[100]

State law is controlling as to negligence.[101] Recovery is not

[92] 28 U.S.C.A. §2680 (k) (1948), 60 Stat. 845 §421 (k) (1946), 28 U.S.C. §943 (k) (1946).

[93] Spelar v. United States, 75 F. Supp. 967 (E.D. N.Y. 1948).

[94] Relying on such construction given in a claim for wages under the Fair Labor Standards Act of 1938, 52 Stat. 1060 (1938), 60 Stat. 1095 (1946), 28 U.S.C. §201 (1946). Connell v. Vermilya-Brown Co., Inc., 164 F. 2d 924 (C.C.A. 2d 1947).

[95] 28 U.S.C.A. §1346 (b), 60 Stat. 843 §410 (a) (1946), *as amended,* 61 Stat. 722 §410 (a) (1947), 28 U.S.C. §931 (a) (1946).

[96] Brunell v. United States, 77 F. Supp. 68 (S.D. N.Y. 1948).

[97] Straneri v. United States, 77 F. Supp. 240 (E.D. Pa. 1948).

[98] 28 U.S.C.A. §1346 (b) (1948) 60 Stat. 843 §410 (a) (1946), *as amended,* 61 Stat. 722 §410 (a) (1947), 28 U.S.C. §931 (a) (1946).

[99] 28 U.S.C.A. §2674, 60 Stat. 843 §410 (a) (1946), *as amended,* 61 Stat. 722 §410 (a) (1947), 28 U.S.C. §931 (a) (1946).

[100] 28 U.S.C.A. §§2411, 2674 (1948). 60 Stat. 843 §410 (a) (1946), *as amended,* 61 Stat. 722 §410 (a) (1947), 28 U.S.C. §931 (a) (1946).

[101] Spell v. United States, 72 F. Supp. 731 (S.D. Fla. 1947) (state law makes it a duty to stop if blinded by the lights of an oncoming car and failure to do so is negligence); Norton v. United States, 74 F. Supp. 278 (S.D. Tex. 1948); Parmiter v. United States, 75 F. Supp. 823 (D. Mass. 1948); Barnett v. United States, 78 F. Supp. 186 (N.D. Fla. 1948).

diminished on account of any insurance the claimant has received.[102] Notwithstanding the provision of the state law which prevents an infant being charged with contributory negligence, where the evidence shows that the infant's actions were the sole proximate cause, there is no ground upon which the United States may be held liable.[103]

When an injury involves both property damage and personal injuries and the complainant has been compensated for one, it becomes essential to determine whether there is one cause of action for both[104] or whether there is a separate cause of action for each.[105] No problem is presented if the state courts have decided the question; but where the state courts have not decided the question, since there is no settled federal rule, it is assumed that the state courts and the federal appellate courts would follow the majority rule that there is one cause of action for both property damage and personal injuries resulting from the single wrongful act.[106] The requirement of the local law that the plaintiff must establish his freedom from contributory negligence is substantive and must be applied by the federal courts.[107] Therefore, in cases brought under the Tort Claims Act in states where the plaintiff has the burden of establishing his freedom from contributory negligence, Rule 8 (c),[108] providing that contributory negligence is an affirmative defense, is not applicable.[109]

Federal courts follow the lex fori as to privileged communications,[110] but a statement by the deceased, as to whether he saw the car which struck him, has no reasonable connection with the treatment to be rendered by the attending physician and is not privileged.[111] Under the Tort Claims Act, the law and terminology of the forum should be applied as to res gestae.[112]

The measure and extent of damages is substantive and the law

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[102] Parmiter v. United States, *supra* note 101.

[103] Madden v. United States, 76 F. Supp. 41 (N.D. Fla. 1948).

[104] King v. Chicago, M. & St. P.R.R., 80 Minn., 83, 82 N.W. 1113 (1900).

[105] Vasu v. Kohlers, Inc., 145 Ohio St. 321, 61 N.E. 2d 707 (1945).

[106] Van Wie v. United States, 77 F. Supp. 22 (N.D. Iowa 1948); King v. Chicago, M. & St. P. R.R., *supra* note 104.

[107] Van Wie v. United States, *supra* note 106; Ft. Dodge Hotel Co. v. Bartlet, 119 F. 2d 253 (C.C.A. 8th 1941).

[108] Federal Rules of Civil Procedure, 28 U.S.C. following §723 (c) (1946).

[109] Van Wie v. United States, *supra* note 106.

[110] Van Wie v. United States, *supra* note 106. *Cf.* Munger v. Swedish American Lines, 35 F. Supp. 493 (S.D. N.Y. 1940); Aetna Life Ins. Co. v. McAdoo, 106 F. 2d 618 (C.C.A. 8th 1939); Union P. R.R. v. Thomas, 152 Fed. 365 (C.C.A. 8th 1907).

[111] Van Wie v. United States, 77 F. Supp. 22 (N.D. Iowa 1948).

[112] *Ibid.*

of the place of injury must be applied.[113] In applying the state law to determine the measure of recovery, some unusual determinations are obtainable. For example, in the *Van Wie* case,[114] the court applied rules set forth by Iowa courts and allowed probable future accumulations *less* the current discount rate of a good sound investment;[115] and in the same case it was found that under the state law, the personal representative may not recover the amount expended for funeral expenses, but is entitled to interest, at the current rate, on the amount so expended, for decedent's normal life expectancy at time of his death.

In Massachusetts when an insurer by terms of its policy becomes a subrogee rather than assignee of the insured's claim, the insurer is not entitled to the benefit of the statute permitting an assignee under a written assignment to sue in his own name,[116] but is relegated to its rights under the common law of Massachusetts denying the right of a subrogee to sue the tortfeasor in his own name.[117]

Derivative Claims

There is a rather one-sided split of authority on the right of an insurance company to sue the United States. The overwhelming number of the reported district court cases permit such actions,[118]

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[113] Slater v. Mexican National R.R., 194 U.S. 120 (1904); Commonwealth Fuel Co. v. McNeil, 103 Conn. 390, 130 Atl. 794 (1925).

[114] See note 22 *supra.*

[115] Stein v. Sharpe, 229 Iowa 812, 295 N.W. 155 (1940); In re Kees' Estate, 31 N.W. 2d 380 (Iowa 1948).

[116] Mass. Ann. Laws c. 231, §5 (1933).

[117] Gray v. United States, 77 F. Supp. 869 (D. Mass. 1948); Clark v. Wilson, 103 Mass. 219 (1869). *Cf.* Southern R.R. v. Blunt & Ward, 165 Fed. 258 (S.D. Ala. 1908) (same result where value of subrogor's right exceeds amount paid by him to insurer-subrogee).

[118] a) Permitting derivative actions against the United States: Oahu R.R. & Land Co. v. United States, 73 F. Supp. 707 (D. Hawaii 1947); Hill v. United States, 74 F. Supp. 129 (N.D. Tex, 1947); Wojciuk v. United States, 74 F. Supp. 914 (E.D. Wis. 1947); Forrester v. United States, 75 F. Supp. 272 (E.D. Wis 1947); Grace v. United States, 76 F. Supp. 850 (S.D. N.Y. 1948); Niagara Fire Ins. Co. v. United States, 76 F. Supp. 850 (S.D. N.Y. 1948); Insurance Co. of North America v. United States, 76 F. Supp. 951 (E.D. Va. 1948); Van Wie v. United States, 77 F. Supp. 22 (N.D. Iowa 1948); Town of Amherst v. United States, 77 F. Supp. 80 (W.D. N.Y. 1948); State Road Dept. of Florida v. United States, 78 F. Supp. 278 (N.D. Fla. 1948).

b) Denying derivative actions: Bewick v. United States, 74 F. Supp. 730 (N.D. Tex. 1947); McCasey v. United States (Unreported) (E.D. Mich.); Cascade County v. United States, 75 F. Supp. 850 (D. Mont. 1948); Aetna Casualty & Surety Co. v. United States, 76 F. Supp. 333 (E.D. N.Y. 1948). In Gray v. United States, 77 F. Supp. 869 (D. Mass. 1948) action brought by an insurance company was dismissed, but for the reason that under

and the only two circuit courts of appeals deciding the issue have reversed lower court decisions denying the right.[119]

The government's contentions have been practically the same in every case, namely, congressional intent, strict construction, and anti-assignment act. Many cogent arguments have been advanced by the courts permitting derivative suits to dispel the government's objections, some of which follow: First, the words of the act indicate a clear and sweeping waiver of immunity and a subrogee is a claimant whose claim exists "on account of" damage to property.[120] Second, nothing supports the government's contention that Congress intended the word "claimant" to refer only to the one originally sustaining the loss or injury. The same phrase was utilized in the Small Tort Claim Act[121] under which subrogees' claims were consistently approved by Congress.[122] Third, had Congress intended to exempt subrogees, it would undoubtedly have included subrogees in the exempt categories of the act as it did in the Foreign Claims Act.[123] Failure to exclude subrogation claims is strong evidence of an intention to include them in view of the historical background of the act.[124] Fourth, the intent of Congress was to relieve its members of the burden of considering hundreds of private claims at each session.[125] Fifth, "a comparison of the Federal Torts Claims Act with the Suits in Admirality Act may reasonably lead to the conclusion that the language of the Tort Claims Act is broader."[126] The

Massachusetts law a subrogee has no right to sue the tortfeasor in his own name but the subrogee's rights are equitable in nature, entitling him to sue the tortfeasor only in the name of the subrogor. By the terms of the policy the insurance company became the subrogee rather than assignee.

[119] Employer's Fire Ins., Co. v. United States, 167 F. 2d 655 (C.C.A. 9th 1948), *reversing* 74 F. Supp. 669 (S.D. Cal. 1947); Old Colony Ins. Co. v. United States, 168 F. 2d 931 (C.C.A. 6th 1948) *reversing* 74 F. Supp. 723 (S.D. Ohio 1947).

[120] 60 STAT. 843 §410 (a) (1946), *as amended,* 61 STAT. 722 §410 (a) (1947), 28 U.S.C. §931 (a) (1946). In the present form, 28 U.S.C.A. §1346 (1948), the words "on account of" are omitted. Employers' Fire Ins. Co. v. United States, *supra* note 119; Niagara Fire Ins. Co. v. United States, *supra* note 118 (a).

[121] 42 STAT. 1066 (1922), 31 U.S.C. §215 (1940).

[122] Employers' Fire Ins. Co. v. United States, *supra* note 119; Wojciuk v. United States, *supra* note 118 (a); Niagara Fire Ins. Co. v. United States, *supra* note 118 (a). H. R. REP. No. 2655, 79th Cong. 2d Sess. 5, 13 (1946).

[123] 31 U.S.C. §224 (d) (1946); "including claims of insured but excluding claims of subrogees." Employers' Fire Ins. Co. v. United States, *supra* note 119; Niagara Fire Ins. Co. v. United States, *supra* note 118 (a); Insurance Co. of North America v. United States, *supra* note 118 (a).

[124] 36 OPS. ATT'Y GEN. 553 (1932); Employers' Fire Ins. Co. v. United States, *supra* note 119; Insurance Co. of North America v. United States, *supra* note 118 (a).

[125] Forrester v. United States, 75 F. Supp. 272 (E.D. Wis. 1947).

[126] Employers' Fire Ins. Co. v. United States, 167 F. 2d 655, 657 (C.C.A. 9th 1948).

Suits in Admiralty Act covers claims of subrogees.[127] Regulations promulgated by the War Department for guidance in administrative settlement of claims, provide that claims otherwise valid shall not be rejected merely because the claimant has been paid by an insurer. A claim in the name of a subrogated insurer shall be determined and paid under local law.[128] Sixth, where a statute contains a clear and sweeping waiver of immunity from suit on *all* claims with certain well-defined exceptions, resort to strict construction cannot be had to enlarge the exceptions.[12] Seventh, the anti-assignment act[130] has reference only to voluntary assignments of claims against the United States, and *not* to transfers of title by operation of law.[131] The purpose of the Assignment of Claims Act[132] is to protect the United States against loss of defenses which it has to claims by an assignor which might not be applicable to an assignee. Such defenses are expressly reserved under the Tort Claims Act.[133] Subrogation is not an assignment to a stranger which might possibly bring into play the anti-assignment statute.[134] Subrogation is the enforcement of the original claim and is the injured person's claim although enforced by another.[135] Eight, multiplicity of suits cannot occur because both insured and insurer are bound by the adjudication.[136] Ninth, if the government's view were adopted, the effect could easily and legitimately be avoided either by the insurer's stipulation that the insured sue the United States

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[127] Employers' Fire Ins. Co. v. United States, *supra* note 126; Forrester v. United States, *supra* note 125.

[128] U. S. CODE CONGRESSIONAL SERVICE 2106 *et seq.* (1947); Grace v. United States, 76 F. Supp. 174 (D. Md. 1948).

[129] Employers' Fire Ins. Co. v. United States, *supra* note 126; Niagara Fire Ins. Co. v. United States, 76 F. Supp. 850 (S.D. N.Y. 1948); Insurance Co. of North America v. United States, 76 F. Supp. 951 (E.D. Va. 1948).

[130] R.S. §3477 (2d ed. 1878), 35 STAT. 411 (1908), 54 STAT. 1029 (1940), 31 U.S.C. §203 (1946).

[131] Employers' Fire Ins. Co. v. United States, *supra* note 126; Hill v. United States, 74 F. Supp. 129 (N.D. Tex. 1947); Wojciuk v. United States, 74 F. Supp. 914 (E.D. Wis. 1947); Forrester v. United States, 75 F. Supp. 272 (E.D. Wis. 1947); Niagara Fire Ins. Co. v. United States, *supra* note 129; Grace v. United States, *supra* note 128; Insurance Co. of North America v. United States, *supra* note 129; National Bank of Commerce v. Downie, 218 U.S. 345 (1910); Martin v. National Surety Co., 300 U.S. 588 (1937); McKenzie v. Irving Trust Co., 323 U.S. 365 (1945).

[132] See note 130 *supra.*

[133] 28 U.S.C.A. §1346 (b,c) (1948), 60 STAT. 844 §411 (1946), 28 U.S.C. §932 (1946). Grace v. United States, *supra* note 128, State Road Dept. of Florida v. United States, 78 F. Supp. 278 (N.D. Fla. 1948) (Counterclaim by the United States).

[134] Forrester v. United States, *supra* note 131.

[135] Insurance Co. of North America v. United States, *supra* note 129; United States v. American Tobacco Co., 166 U.S. 468 (1897).

[136] Forrester v. United States, *supra* note 131.

as a prerequisite to recovery against the insurer, or by making a loan and bringing an action in the name of the insured.[137] A direct suit is not contrary to any policy of the United States.[138]

The four cases denying the right to bring derivative suits have followed the same lines of reasoning but reach a different result. The Assignment of Claims Act[139] "strikes at every derivative interest, in whatever form acquired and incapacitates every claimant upon the government from creating an interest in the claim in any other than himself."[140] If the subrogation agreement were voluntarily carried out it would violate the statute; and were the insured to refuse and the insurance company to be subrogated by operation of law, there would still be a violation of the statute.[141] "It embraces alike legal and equitable assignments."[142]

The contention that the anti-assignment statute does not apply when there has been a transfer of title by operation of law[143] applies only when the title to property passes and does not encompass an assignment of an action in tort against the United States.[144] One of the primary reasons for the anti-assignment statute was to protect the government from multiplication of the number of persons with whom it must deal; therefore, if permitted under the Tort Claims Act, it is contrary to the intent of the act.[145]

Expressio unius est exclusio alterius is not permitted by the exclusions of the Tort Claims Act, since that section[146] is one of restriction upon the consent granted by the government and not one of enlargement.[147] The right to sue the government must be de-

[137] Luckenbach v. McCahan Sugar Co., 248 U.S. 139 (1918); The Plow City, 122 F. 2d 816 (C.C.A. 3d 1941), *cert. denied*, 315 U.S. 798 (1941); State Road Dept. of Florida v. United States, *supra* note 133.

[138] Insurance Co. of North America v. United States, 76 F. Supp. 951 (E.D. Va. 1948).

[139] 31 U.S.C. §203 (1946): ". . . shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, *after* the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." (Emphasis supplied).

[140] National Bank of Commerce v. Downie, 218 U.S. 345, 353 (1910); Cascade County v. United States, 74 F. Supp. 850 (D. Mont. 1948).

[141] Cascade County v. United States, *supra* note 140; Bewick v. United States, 74 F. Supp. 730 (N.D. Tex. 1947).

[142] National Bank of Commerce v. Downie, *supra* note 140 at 353.

[143] Western Pacific Co. v. United States, 268 U.S. 271 (1925); United States v. Gillis, 95 U.S. 407 (1877).

[144] Cascade County v. United States, *supra* note 140.

[145] Cascade County v. United States, *supra* note 140. *See* Goodman v. Niblack, 102 U.S. 556 (1880).

[146] 28 U.S.C.A. § 2680 (1948), 60 STAT. 845 §421 (1946), 28 U.S.C. §943 (1946).

[147] Cascade County v. United States, *supra* note 140.

termined solely from the section granting the right and not by negative implication from the specific exemptions. The Act is for the benefit of the citizens and is so restricted.[148] To hold that the grant to claimants for damage, loss, injury, or death includes claims of a subrogee would do violence to the language of the statute[149] which, as a waiver of sovereign immunity, must be strictly construed.[150] Nor can it be shown that there is a close analogy between the Tort Claims Act and the Suits in Admiralty Act which provides for the bringing of a libel in personam against the United States in cases where "a proceeding in Admiralty could be maintained"[151] against private owners.[152]

DAMAGES

The goal of virtually every civil action is to recover damages. The number of claims filed and the amount asked in the two fiscal years since the Tort Claims Act became effective will be found in the table following. In 179 cases disposed of, as of March 31, 1948, the United States had already been held liable for a total of $993,186.07, with 402 cases filed in 1947 still pending and all of the 1058 cases filed in 1948 still pending.

The individual claims have varied from $163.28[153] to three claims totaling $18,917,878.00[154] for property damage and injuries resulting from the Texas City disaster of 1947. It is too early to draw any conclusions of the comparative merit of trial by court and trial by jury in the allowance of damages. The plaintiff has been held to be entitled to damages for physical injuries, pain, suffering, medical expenses, and property damage.[155] Loss of earnings has been allowed where the injured person suffered such loss.[156]

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[148] Bewick v. United States, *supra* note 141.

[149] Aetna Casualty & Surety Co. v. United States, 76 F. Supp. 333 (E.D.N.Y. 1948).

[150] Cascade County v. United States, *supra* note 140; Aetna Casualty & Surety Co. v. United States, *supra* note 149.

[151] 41 STAT. 525 (1920), 46 U.S.C. §742 (1946).

[152] Aetna Casualty & Surety Co. v. United States, *supra* note 149.

[153] Civ. No. 10,067, D. N.J., dismissed Nov. 14, 1947.

[154] Civ. No. 535—$8,000,000.00, Civ. No. 666—$9,500,553.00, Civ. No. 667—$1,417,325.00; District Court for the Southern District of Texas, Galveston, Texas, filed in fiscal year ending June 1948.

[155] McMullan v. United States, 75 F. Supp. 164 (E.D. N.Y. 1947); Campbell v. United States, 75 F. Supp. 181 (E.D. La. 1948); Parmiter v. United States, 75 F. Supp. 823 (D. Mass. 1948); Bickley v. United States, 77 F. Supp. 454 (E.D. S.C. 1948); Colerick v. United States, 77 F. Supp. 953 (N.D. Fla. 1948).

[156] Norton v. United States, 74 F. Supp. 278 (S.D. Tex. 1948) (allowed profits plaintiff would probably have made in real estate transactions); McMullan v. United States, *supra* note 155; Bickley v. United States, *supra* note 155; Colerick v. United States, *supra* note 155; Barnett v. United States, 78 F. Supp. 186 (N.D. Fla. 1948).

One case has allowed future nursing expenses for the life expectancy of the plaintiff and future anticipated medical expenses.[157] The only reported case involving the death of an infant allowed damages for loss of the child's earning capacity during minority *less* cost of maintenance, funeral expenses, and loss of association.[158] Recovery is not to be diminished on account of any insurance the plaintiff may have received,[159] but the Act requires that the court determine the amount of attorney's fees — not to exceed 20% of the recovery — which must be paid out of the award but not in addition to it.[160]

At the present time there are sixteen cases pending in the various circuit courts of appeals. No case has been appealed to the Court of Claims,[161] and no cases are pending in the Supreme Court of the United States.[162]

William Bentle Devaney, Jr.

August 2, 1946 — June 30, 1947

Nature of Action	Total Claims	Number of Cases With Stated Amounts	Number of Cases Without Stated Amounts*	Amounts Asked Under Cases With Stated Amounts	Total Recovery In 179 Cases As Of March 31, 1948
Personal injury — motor vehicle	414	286	128	$ 7,330,096.78	
Personal injury — other	140	74	66	2,306,476.13	
Personal property damage	84	56	28	1,223,338.01	
Real property damage	16	13	3	106,698.00	
	654	429	225	$10,966,608.92	$993,186.07

[157] Campbell v. United States, *supra* note 155. See also Colerick v. United States, *supra* note 155.

[158] Wilscam v. United States, 76 F. Supp. 581 (D. Hawaii 1948).

[159] Parmiter v. United States, *supra* note 155.

[160] 28 U.S.C.A. §2678 (1948), 60 STAT. 846 §422 (1946), 28 U.S.C. §944 (1946). Provision of the act is permissive—"may allow"—and not mandatory. Spell v. United States, 72 F. Supp. 731 (S.D. Fla. 1947); Norton v. United States, *supra* note 156.

[161] 28 U.S.C.A. §1504 (1948), 60 STAT. 844 §412 (1946), 28 U.S.C. §933 (1946).

[162] Information furnished by Mr. H. G. Morrison, Assistant Attorney General, Claims Division, Department of Justice, in a letter dated August 5, 1948.

July 1, 1947 — March 31, 1948

Nature of Action	Total Claims	Number of Cases With Stated Amounts	Number of Cases Without Stated Amounts*	Amounts Asked Under Cases With Stated Amounts	Total Recovery In 179 Cases As Of March 31, 1948
Personal injury — motor vehicle	411	354	57	$ 8,408,141.55	$993,186.07
Personal injury — other	253	222	31	23,070,085.15	
Personal property damage	109	89	20	985,759.81	
Real Property damage	285	75	210	10,460,830.46	
	1058	740	318	$42,924,816.97	$993,186.07

This information was supplied by the Administrative Office of the United States Courts, and was compiled by Mr. W. B. Devaney, Sr.

*Previously the courts were not required by the administrative office to indicate the amount of damages asked. So far as it can be determined, there was a specific amount asked in each of these cases.

Cases filed August 2, 1946 — June 30, 1947

Pending (March 31, 1948)	402
Court trial	122
Consent	46
Settled	4
Removed to State Court	1
Dismissed	79
	654